IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. [redacted]16

JERRY DOUGLAS MEMPA, *Petitioner*,

v.

B. J. RHAY, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY, AT WALLA WALLA, WASHINGTON, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATE PRINTING PLANT, OLYMPIA, WASH.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To: THE HONORABLE EARL WARREN, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, JERRY DOUGLAS MEMPA, prays this court to issue a writ of certiorari to review the judgment of the Supreme Court of the State of Washington denying the petitioner's application for a writ of habeas corpus. The Opinion of the Supreme Court of the State of Washington in this case is reported at 68 W.D.2d 871 (Adv. Sheet Vol. 19) 416 P. 2d 104 (Adv. Sheet Vol. 1).

This brief is submitted in opposition to the granting of certiorari, both on the merits and for the further reason that the petitioner will be afforded relief upon a presently pending application for habeas corpus before the Supreme Court of the State of Washington.

SUPPLEMENTARY STATEMENT OF CASE

The petitioner was apprehended by the police of the City of Spokane on April 28, 1959, on the belief that he had participated in the taking of one or more automobiles without the permission of the owner. He was placed in the custody of the Spokane Juvenile Detention Home. On April 29, 1959, the petitioner escaped from the detention home and during his absence on escape, and on May 1, 1959, the juvenile court entered its order relinquishing its exclusive jurisdiction of petitioner, who was under 18 years of age, (RCW 13.04.010) and transferred the matter "to the prosecuting attorney of Spokane County, State of Washington, for prosecution under the provisions of the Criminal Code". On May 18, 1959, the petitioner surrendered himself to the Sheriff of Spokane County at which time he was accompanied by his stepfather.

On May 26, 1959, an Information was filed by the prosecuting attorney of Spokane in the Superior Court for Spokane County charging the petitioner with the crime, a felony, of TAKING AND RIDING IN A MOTOR VEHICLE WITHOUT THE PER-

MISSION OF THE OWNER in violation of provisions of RCW 9.54.020.

On June 17, 1959, the petitioner was brought before the Superior Court for arraignment and the taking of his plea to the charges as contained in the Information. He was then represented and was accompanied by his counsel, Mr. Willard Roe. At that time, the Information was read to the petitioner and he was then offered an additional 24 hours within which to enter his plea and being asked whether he wanted to plead or wait 24 hours, he indicated that he desired to enter his plea at that time. Upon being asked what his plea was to the crime as contained in the Information, the petitioner entered a plea of "Guilty". Thereafter, after considerable discussion between the court, the prosecuting attorney, Mr. Willard Roe, petitioner's attorney and the petitioner, the following took place.

* * *

THE COURT: You may stand up. Is there anything you want to say on your own behalf before the judgment of the court is pronounced in this case?

* * *

THE COURT: Anything else you want to say?
MR. MEMPA: No.
THE COURT: Very well. It is the further judgment of the court that you be confined in the institution for a maximum period of ten years. Now, I am going to suspend every bit of that except thirty days. I want you to serve thirty days actually on this. I want to point out to you now

> that when you are released you are going to be under observation, not of the juvenile officers, but of the state parole officers.
> * * *
>
> (Taken from transcript of proceedings filed in *Mempa v. Rhay*, Supreme Court No. 38470). Appendix B, page 54

On October 23, 1959, the petitioner was back before the Superior Court for Spokane County upon the motion of the prosecuting attorney for the revocation of his probation. At that time, the petitioner was not accompanied by counsel nor represented but was accompanied by his stepfather, Mr. Dickerson. Following the hearing on the motion to revoke probation the court stated as follows:

> THE COURT: All right, that's all. Hand up the order revoking the probation. I'm signing the order revoking probation that I previously granted you. Now, stand up Jerry. Probation having been revoked, it is the further judgment of the court that you be confined in the Washington State Reformatory for a maximum period of ten years. The parole board will fix the time you stay there. I am going to recommend a year for you * * * (Tr. 23)

Following the decision by the Supreme Court of the State of Washington in the petitioner's case, on June 23, 1966, the petitioner filed another application for a writ of habeas corpus in the Supreme Court of the State of Washington which was filed on July 12, 1966 and was set for hearing October 7, 1966 in Cause No. 39048. A partial transcript of the record

in said Cause No. 39048 is attached hereto as an Appendix to this brief.

In the petitioner's second application to the Supreme Court of Washington, the petitioner contends that his constitutional rights were violated when the juvenile court of Spokane County relinquished its exclusive jurisdiction over him, without notice, without counsel nor hearing, at a time when he was under the age of 18 years.

The respondent, through the Attorney General of the State of Washington, in its return and answer, has admitted the historical facts of the petitioner's case. On October 7, 1966, the date which the matter had been set for hearing, an order of continuance was entered continuing the matter to a date to be determined after the final disposition of the case of *Dillenburg v. Maxwell*, 68 W.D.2d 481, 413 P. 2d 940 which controls the determination of the petitioner's case and the relief to be granted to him. (App. p. 34)

REASONS FOR NOT GRANTING WRIT OF CERTIORARI

A. Probable Mootness as a Result of Petitioner's Second Application for Relief to the Supreme Court of Washington.

As before noted and touched upon by the petitioner at page 15 of his application for writ of certiorari, Mempa petitioned the Supreme Court of Washington for a writ of habeas corpus which was filed on July 12, 1966 prior to the filing of the petition

for certiorari in this cause. As we have indicated, Mempa at the time of his apprehension on the charges and the conviction which he challenges here, was a juvenile and subject to the exclusive jurisdiction of the juvenile court for Spokane County. (RCW 13.04 .010) Subsequent to Mempa's arrest, the juvenile court relinquished its exclusive jurisdiction and remanded Mempa to the prosecuting authorities of Spokane County for prosecution under the Criminal Code. This was done while Mempa was an escapee, and, of course, without notice, without hearing and without representation by counsel, contrary to the findings of this court in *Kent v. United States*, 383 US—, 16 L.ed. 2d 84, 86 S.Ct. 1045 which was adopted by the Supreme Court of Washington in *Dillenburg v. Maxwell*, 68 W.D.2d 481,—P. 2d— (Dec'd April 28, 1966) as

> conclusive * * * of whether a judicial hearing is required by our statute in order to fulfill the procedural requirements of due process.

In *Dillenburg v. Maxwell, supra*, the Attorney General on behalf of the respondent petitioned the Supreme Court of Washington for a rehearing, which was granted by the court, directed solely and completely to the relief granted to *Dillenburg*, and, in no way complaining of the substantiative rules of law made by that case. The court, in *Dillenburg*, granted the appellant relief from the judgment and sentence and ordered that he either be retried within 20 days or discharged from custody. The petition of the Attorney General for rehearing requested the court to

reconsider the relief granted to *Dillenburg*. In the argument in support of the petition for rehearing, the Attorney General recommended

> that the court remand this matter to the Superior Court of the State of Washington for Jefferson County for a *de novo* determination of waiver of juvenile jurisdiction consistent with the opinions in *Dillenburg* and *Kent*,
>
> (1) Unless it be determined that such *de novo* retrospective determination would be constitutionally prejudical to petitioner, in which event the conviction would be set aside; or,
>
> (2) In the event the Superior Court finds that the waiver from juvenile court was inappropriate, and that the petitioner should have been dealt with as a juvenile, then the conviction must be set aside,
>
> (3) But, if the waiver is found to have been appropriate when made, the conviction stands, and the court may proceed to hear and determine the unresolved issues in petitioner's application;
>
> (4) And, if the court finds that number 1 or 2 above are applicable to petitioner's case, then the petitioner should be afforded a new trial within twenty days, or discharged from custody.

Manifestly, *Mempa*, on his application for a writ of habeas corpus to the Supreme Court of Washington will be entitled to either a new trial or discharge from custody as prescribed in the original *Dillenburg* decision, or, the relief suggested by the Attorney General in its petition for rehearing quoted from above. As well, this is implicit in the court's order of continuance of the petitioner's hearing on his ap-

lication for a writ of habeas corpus in Cause No. 39048 before the Supreme Court of Washington. (App. p. 34)

A hearing was held before the Supreme Court of Washington on September 27, 1966 on the Attorney General's petition for rehearing, and, it is anticipated that a decision will be forthcoming soon. In the light of these circumstances, it is obvious that the issues presented to the court in Mempa's petition for a writ of certiorari may become moot, and never reached by the court as a result of the disposition of Mempa's application for a writ of habeas corpus to the Supreme Court of Washington.

It is respectfully suggested that the "special and important reasons" for the granting of a writ of certiorari in this case, as required by Supreme Court Rule 19 may well have been dissipated, and become academic, prior to this case ever becoming ripe for decision by the court.

Accordingly, it is respectfully sugested that the court either deny the application for a writ of certiorari in this case, or defer action in granting the petitioner a writ of certiorari until the Supreme Court of Washington has acted upon Mempa's application for a writ of habeas corpus in Cause No. 39048.

B. PROBATION REVOCATION HEARINGS ARE NOT "CRIMINAL PROSECUTIONS" WITHIN THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Since *Jaime v. Rhay*, 59 Wn.2d 58, 365 P.2d 772 (1961), it has been the law of Washington that probation revocation hearings are not in the nature of a criminal prosecution, and, the ordinary constitutional right to the appointment of counsel as prescribed by the constitution is not applicable.

The Sixth Amendment to the Constitution of the United States defining the rights of accused persons, including the right to counsel, provides:

> In all *criminal prosecutions, the accused shall enjoy* the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have complusory process for obtaining witnesses in his favor, and to have the *assistance of counsel for his defense.* (Emphasis ours)

The decision in *Jaime v. Rhay*, *supra*, finding that the right to counsel did not apply in probation revocation hearings, was based upon a premise that such a hearing was neither a criminal prosecution, nor a part of the criminal proceedings leading to the conviction of the defendant.

That this is true should be abundantly clear. The question before the court at the time of the hearing upon the motion to revoke the convicted defendant's probation is not directed to the probationer's guilt or

innocence of the underlying crime, but the inquiry goes to the truth of the accusations made of a violation of conditions of probation. The sole subject of inquiry is whether or not the convicted defendant has breached the trust vested in him by the court.

It is forcefully argued that a revocation hearing brings to the fore, vital and significant questions, which may result in the liberty, or imprisonment of the convicted defendant, and, therefore, due process concepts of right to counsel inhere in the proceedings. Such an argument conveniently overlooks the fact, that the resulting sentence on revocation of probation, is not imposed for the violation of probation, — which may not, and often is not, for the commission of a crime — but, the sentence is the punishment for the crime for which the defendant had previously been found guilty.

The source of a convicted defendant's rights in a probation revocation hearing, in this state, arise solely and completely under the probation act (RCW 9.95.200 - 9.95.250) and not from the constitution of this state or of the United States. A probation revocation hearing, not being a "criminal prosecution", decisions of this court concerning the rights of accused persons to have the assistance of counsel at various stages of the criminal proceedings, we submit, are neither applicable nor controlling under these circumstances. Cf. *Gideon v. Wainwright*, 372 US 335, 83 S.Ct. 792, 9 L.ed. 2d 799 (1963); *White v. Maryland*, 372 US 59 (1963); *Douglas v. California*, 372 US 353 (1963).

Also, it must be remembered, that at all times through the granting of probation to the petitioner by the Superior Court, he was represented by an exceptionally able attorney, Mr. Willard Roe, who incidentally is now a Superior Court Judge. At that time, both the petitioner, Mempa, and his attorney, were fully aware of the criminal charges made against him and contained in the Information of which they were supplied copies. At the time of arraignment, with his counsel, Mempa entered a plea of Guilty. He then stood convicted of the crime of TAKING A MOTOR VEHICLE WITHOUT THE PERMISSION OF THE OWNER and his conviction rested upon his plea which, in effect, admits the truth of the charges made against him. At the time of the entry of his plea of Guilty, the "criminal prosecution" had come to an end, and no appeal lies from a conviction on a plea of guilty, at least insofar as it goes to the question of guilt or innocence. An appeal may be taken upon matters which are collateral to the conviction and go to the jurisdiction of the Superior Court. However, at the time of the entry of the plea of Guilty, any errors or irregularities which might be appealable should be known by the petitioner's counsel and it must be presumed that if there were such errors or irregularities, and most certainly, if they were of constitutional dimensions, counsel would have so advised petitioner. Following the entry of a plea of Guilty by Mempa, his counsel made a forceful and persuasive argument to the court to grant probation to the petitioner. Following this, the record shows

that the court pronounced sentence and suspended it and granted the petitioner probation for a period of two years upon the condition that he serve thirty days in the county jail.

In the petitioner's case before the Supreme Court of Washington, the court took the position that all things happening following the entry of the petitioner's plea of Guilty did not constitute a part of the "criminal prosecution" and due process considerations were inapplicable. In this respect, the court stated in part as follows:

> (*Mempa v. Rhay*, 68 W.D.2d at p. 874-877) Considering probations as a class of criminal offenders, there is a close analogy between their status and the status of others who have pleaded guilty — or have been convicted — and have been committed to institutional custody, supervision and discipline rather than being granted probation. The administration and control of the activities and conduct of the latter group is of course performed by the prison authorities. It would seem farfetched to suggest that the courts should invade this particular sphere of administrative prerogative and, by judicial fiat, exercise some sort of supervisory authority over existing prison administration, standards and practices.
>
> In terms of further insight into the nature of probation and the administration of the probation system, similar reference and analogy could also be made to the functions of the State Board of Prison Terms and Paroles. The Board fixes the period of confinement and the terms and conditions of parole of those criminal offenders who have been committed to state institutional custody. In addition, the Board has the authority and the responsibility for adminstration of the state probation system. Judicial scrutiny, re-

view, and control over the everyday matters of prison administration and/or parole administration is not only *not feasible; it is inadvisable* in the light of the particular expertise and training necessary to provide effective institutional custody and parole supervision. Judicial invasion of prison administration inevitably would be most disruptive of prison programing, supervision and discipline. The courts cannot and should not be expected to go into the prisons and decide which prisoners should be treated as "trustees". The point is obvious: prison officials must have effective control and authority in order to maintain an effective prison program. The same can be said of probation programing and administration.

Administrative and field probation officers, as well as prison officials, work diligently to establish workable programs for effective guidance of criminal offenders under their supervision and in their semicustody. Easy access to the courts by probationers to re-evaluate, or challenge, varied aspects of probation programing could well be disastrous in terms of the operation of the Washington state probation system. We are convinced that effective supervision of the probation vehicle by probation officers is a sensitive area, and one not particularly suited to detailed, overall, or even general judicial supervision.

It may seem somewhat more appealing and persuasive to contemplate according full due process rights and privileges to probationers with respect to the termination of their liberty to be at large in their communities than would be the case with respect to the termination of the privileges of prison inmates. However, we are convinced that, while there are some differences in the status and the potential for rehabilitation as between probationers, inmates, and parolees, the problems of administration and the objectives

are basically similar in all three areas. To reiterate: there are no constitutional rights respecting the acquisition of probation status. Logically and rationally, there should be correlatively few, if any, constitutional rights and standards controlling the revocation of probation and matters of administration and supervision of those who have been granted that status.

The above outlined judicial views about the general nature of probation are reinforced by the following language of RCW 9.95.220, which sets out certain legislative policy determinations made with respect to the operation of our probation system. This legislation provides as follows:

> Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer *may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation.* In the event the judgment has been pronounced by the court and *the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect,* and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. *If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of*

> *probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.* (Italics ours.)

It should be noted that the foregoing statute provides that any peace officer or state parole officer may re-arrest a probationer *without warrant or other process;* furthermore, that the court may thereupon, in its discretion, *without notice, revoke and terminate such probation.* The statute further provides that suspended or deferred sentences may be *summarily revoked, sentence imposed, judgment rendered,* and the defendant delivered to the sheriff for transfer to the state penitentiary. While it is true that the revocation of probation does occur in court, and the function is performed by a judge of the superior court, there is nothing in the statute enacted by the legislature to require the observance and application of due process standards as to this facet of the administration of the state probation system. We are not inclined, judicially to impose and to judicially assume responsibility for applying to probation those due process standards which unquestionably are applicable and must be observed in the more orthodox aspects of criminal law administration.

When a convicted person is before the court in the State of Washington, in matters relating to the privilege of his release from custody on probation, any rights that he may then have are to be found in the statutory provisions governing probation, rather than the constitution. The principal statute setting

forth rights and procedures in probationary matters is RCW 9.95.220 which provides:

> Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may, thereupon, in its discretion without notice, revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the Sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the Sheriff to be transported to the penitentiary or reformatory, in accordance with sentence imposed.

The position taken by the Supreme Court of Washington on the right to counsel of convicted defendants appearing before the courts in probation matters, is neither novel or unique, for a respectable number of jurisdictions have decided this issue in substantially the same way as the Supreme Court of Washington in this case. One of the most recent

of these cases is *Brown v. Warden*, United States Penitentiary, 351 F.2d 564 (CCA 7, 1965). Cert. den. 382 US 1028 in which case the court, in its decision, stated in part, as follows:

> An offender's rights under the Federal Probation Act have been construed in Burns v. United States, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932), and in Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). The Act is intended to provide a period of grace in order to aid the rehabilitation of a penitent offender. Probation is conferred as a privilege and cannot be demanded as a matter of right. The offender stands convicted and faces punishment. The source of his rights under the Federal Probation Act lies in the legislative mandate, not in the Constitution of the United States.
>
> Congress has declared that a probationer accused of violating his probation "shall be taken before the court for the district having jurisdiction over him." Section 3653, Title 18 U.S.C.A. Although no trial in any strict or formal sense is required, the legislative directive that the accused probationer shall be taken before a court means that—
>
> > " * * * there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper." Escoe v. Zerbst, 295 US, at 493, 55 S.Ct. at 820.
>
> The inquiry of the court at such a hearing is not directed to the probationer's guilt or innocence in the underlying criminal prosecution, but to

the truth of the accusation of a violation of probation. Has the probationer abused the privilege of the period of grace extended to him to aid him in rehabilitation?

Liberty on probation is conditioned on the observance of certain conduct. A breach of the required conduct—not necessarily the commission of a crime — constitutes a violation and serves to terminate the privilege of conditional liberty. Although revocation results in the deprivation of the probationer's liberty, the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty.

Thus it appears that under the Federal Probation Act as construed by the Supreme Court, the source and nature of the offender's rights and the issue before the court on hearing of revocation of probation differ from those on imposition of sentence in a criminal prosecution. It follows that an offender who has already been adjudged guilty and sentenced is not entitled to counsel as a matter of right under the Sixth Amendment of the Constitution of the United States or under Rule 44 of the Federal Rules of Criminal Procedure in the hearing on revocation wherein it is determined whether or not he has forfeited the privilege of conditional liberty. Welsh v. United States, 348 F.2d 885 (6th Cir. 1965); United States v. Huggins, 184 F.2d 866, 868 (7th Cir. 1950); Gillespie v. Hunter, 159 F.2d 410 (10th Cir. 1947); Bennett v. United States, 158 F. 2d 412 (8th Cir. 1946). Decisions concerned with the constitutional right to counsel of an accused at various stages

of criminal prosecutions are not controlling. Cf. Gideon v. Wainwright, 372 US 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); United States v. Tribote, 297 F.2d 598 (2d Cir. 1961).

Also see *Crowe v. United States*, 175 F.2d 799 (Ca. 4) Cert. den. 338 US 950, Reh. den. 339 US 916; *Richardson v. United States*, 199 F.2d 333 (Ca. 10); *Shum v. Fogliani*, 413 P.2d 495 (Nevada, 1966); *People v. Wood*, 2 McA 342, 139 N.W.2d 895 (Mich, 1966.)

In the petioner's case, there is no dispute, as to the fact that he was represented by counsel prior to, and at the time of pleading guilty to the charges as contained in the criminal information. Also, his attorney made a forceful presentation to the court to grant the petitioner probation. Thereafter, the court pronounced sentence but suspended all but thirty days of the sentence and granted probation in lieu of a judgment and sentence of confinement in a state correctional institution. We submit, that at that time, the rights of the petitioner were derived from the state probation act (RCW 9.95.200-9.95.250) rather than the constitution, probationary matters not being a part of the "criminal prosecution". The probation act of Washington does not confer upon convicted defendants a right to counsel at the time of the revocation of probation followed by the imposition of sentence and such procedure does not do violence to the provisions of the constitution.

WHEREFORE, the respondent respectfully summits that the application of JERRY DOUGLAS MEMPA

for a writ of certiorari to review the decision of the Supreme Court of the State of Washington should be denied.

Respectfully submitted,

JOHN J. O'CONNELL
Attorney General of the State of Washington,

STEPHEN C. WAY
Assistant Attorney General.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Application for a Writ of Habeas Corpus of JERRY DOUGLAS MEMPA, *Petitioner*, vs. B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Respondent*.	No. 39048

ORDER OF CONTINUANCE

The petition of Jerry Douglas Mempa for a writ of habeas corpus having come on regularly for hearing before Department I of this Court on October 7, 1966 the petitioner being represented by Carl Maxey, and the respondent being represented by Lee D. Rickabaugh, Assistant Attorney General; and the Court having read and considered the petition and the respondent's return and answer, and it appearing that the application for a writ of habeas corpus and the return and answer raise the following issue:

Whether or not the petitioner was properly transferred from juvenile status for trial under the provisions of the criminal code, and, if not, what relief should be granted the petitioner.

It further appearing that the opinion in *Dillenburg v. Maxwell*, 68 W.D 2d 481, 413 Pac. 2d 940,

controls a determination of this case, but that the opinion in the Dillenburg case is not yet final, a petition for rehearing having been argued before the En Banc Court on September 27, 1966, and not yet determined; Now, therefore, it is hereby

ORDERED that the hearing in the above entitled proceeding is continued to a date to be determined after the final disposition of *Dillenburg v. Maxwell, supra;* and

IT IS FURTHER ORDERED that both petitioner and respondent shall be afforded the opportunity to file amended briefs prior to the continued hearing and to present oral argument on the issue of the applicability of the final decision in *Dillenburg v. Maxwell, supra,* to the disposition of this proceeding.

Dated at Olympia, Washington, this 20th day of October, 1966.

/S/ HUGH J. ROSELLINI
Chief Justice.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,
Plaintiff,
v.
JERRY D. MEMPA,
Defendant.
No. 16277

TRANSCRIPT OF PROCEEDINGS
June 17, 1959

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR COUNTY OF SPOKANE

STATE OF WASHINGTON,
Plaintiff,
v.
JERRY D. MEMPA,
Defendant.
No. 16277

TRANSCRIPT OF PROCEEDINGS
June 17, 1959

BE IT REMEMBERED:

That the above entitled cause came on for hearing on the 17th day of June, 1959, before the Honorable Louis F. Bunge, Judge of the Superior Court of the State of Washington, in and for the County of Spokane, Washington; the plaintiff being represented by Howard A. Anderson, Deputy Prosecuting Attorney for Spokane County, Washington; the de-

fendant being personally present and being represented by Willard J. Roe, his attorney; and both sides having announced that they were ready, the following proceedings were had, to wit:

MR. ANDERSON: If the Court please, this is a matter, State of Washington v. Jerry D. Mempa, Superior Court No. 16277. The defendant is present in court at this time. He is represented by his attorney, Mr. Willard Roe, and we are here for the purpose of an arraignment.

THE COURT: Is that correct, Mr. Roe? You are here for the purpose of arraignment?

MR. ROE: Yes, your Honor.

MR. ANDERSON: Is your true and correct name Jerry D. Mempa?

MR. MEMPA: Yes.

MR. ANDERSON: Mr. Roe, you have received a copy of this information?

MR. ROE: I have.

MR. ANDERSON: Jerry D. Mempa, has the Deputy Sheriff read the warrant to you?

MR. MEMPA: Yes.

MR. ANDERSON: Jerry D. Mempa, you are charged by complaint filed in this court with the crime of violating Section 9.54.020 of the Revised Code of Washington, commonly known as "Joy-riding," the charging part of the information reading as follows: That you, "Jerry D. Mempa, in the County of Spokane, State of Washington, on or about the 25th day of April, 1959, then and there being, did then and there willfully, unlawfully, and feloniously, without the permission of the owner of person entitled

to possession thereof, intentionally take and drive away a motor vehicle, to wit: a 1956 Chevrolet automobile, Washington License No. CBS-454, the property of Bert Sampson."

THE COURT: You have 24 hours within which to enter a plea. Do you want to plead now or wait the 24 hours?

MR. MEMPA: Plead now.

THE COURT: How old are you, Jerry?

MR. MEMPA: Seventeen.

THE COURT: When will you be eighteen?

MR. MEMPA: Next May.

MR. ROE: May 14th.

THE COURT: You have just turned seventeen, then?

MR. MEMPA: Yes.

THE COURT: Where is your home?

MR. MEMPA: Spokane.

THE COURT: Are your parents here in court?

MR. MEMPA: Yes

THE COURT: What is your plea to the crime of joy-riding as just read to you by the deputy sheriff — guilty or not guilty?

MR. MEMPA: It's guilty.

THE COURT: All right. You may be seated.

MR. ANDERSON: If the Court please, the record for the defendant, Jerry Mempa, as a juvenile, in accordance with what Jerry Mempa has stated to me, on December 19, 1955, at a time when he was thirteen years of age, was before the juvenile officers for burglary. At that time he was detained one week in the juvenile home, and placed on an unofficial probation.

When he was 14 years of age, on April 9, 1956, he was before the juvenile court for a burglary

and malicious vandalism, and at that time, on April 13, 1956, he was placed in the State Training School at the Green Hill Academy, in Chehalis, Washington. He remained there until December 24, 1957, when he was released to his parents.

On February 13, 1958, he was found with wires in his possession that were commonly used to "hot-wire" automobiles. He was placed in the detention home because of this, and on that evening or the following day, there was an attempted break-out from the detention home. Jerry Mempa was one of the parties; however, he states it wasn't his idea or plan, but he had agreed to participate in it. As a result of this conduct, on February 14, 1958, he was returned to the Green Hill Academy in Chehalis, Washington.

On March 24, 1958, because of a riot that had occurred at the Academy, the school authorities or officers refused to keep Jerry Mempa there any longer, and he was returned to Spokane County. At that time, in March of 1958, he was sent to Eastern State Hospital on petition, for a psychopathic delinquent. He was transferred to the Diagnostic Center at Fort Worden, Washington, where he remained approximately ten days, and then he was transferred to Western State Hospital. The authorities at Western State Hospital were of the opinion that he was a psychopathic delinquent, and he was returned to Spokane County for the authorities to take what action they felt was necessary.

A petition was then filed placing him for observation again at Eastern State Hospital as a pos-

sible psychopathic delinquent. The staff at Eastern State Hospital felt that he was not a psychopathic delinquent, and this petition was then dismissed and Jerry Mempa was returned to his home in Spokane.

As he stated, he is seventeen years of age. He was born in Butte, Montana, on May 14, 1942. He has a fourteen-year-old brother who is a student at North Central High School. Jerry Mempa was raised by his grandparents until 1952, at which time he left. He then lived with his mother and his stepfather; they reside at 2518 East Trent. His stepfather is a barber. As far as his education is concerned, he didn't quite finish the eighth grade.

As to the circumstances of this particular case, your Honor, on the evening of April 24, 1958, David Grant and Jerry Mempa were together. David Grant is also a juvenile boy — he has not reached eighteen. The two of them went to Al's Auto Sales, at East 3108 Sprague. Now, the stories are a little conflicting as to just what happened, and David Grant states that Jerry Mempa had a ring of keys, and that he used one of these keys in a 1953 Chevrolet, and that he drove the Chevrolet away and David Grant rode in the car with the defendant. Jerry Mempa states that David Grant was the person that had the ring of keys, and that David Grant drove this car away, and that Jerry Mempa then got in. At any rate, the two boys admit that they both drove this 1953 Chevrolet, they both rode in it, it was taken without permission. During the course of the evening, at approximately 11:00 p.m., they stopped by the home of Charles

Dickerson, who lives at East 1904 Hartson, and Charles Dickerson, David Grant and Jerry Mempa then drove the car around the southeast section of town until it finally ran out of gas in the 1900 block on East 6th.

At that time the car was abandoned and the hub caps and fender skirts were taken from this car and placed in the garage of a relative of Charles Dickerson.

The following evening — now, this is the charge that has been filed against the defendant — on April the 25th of this year, Jerry Mempa and David Grant both rode and drove the 1956 Chevrolet that was taken from the garage at South 309 Haven. This is a private garage where the car was taken. Again the stories are a little bit in conflict. Jerry Mempa states that David Grant came to Mempa's home in this car and stated that it was a car that belonged to a relative of his, and that they then drove in it, Jerry Mempa had not yet driven this car and later on found out that the car had been taken without permission because when Grant would see a policeman or an officer, he would immediately turn and go on some side street. David Grant states that Jerry Mempa — again using this ring of keys, that he had went into the garage at this address and the key fit this 1956 Chevrolet and that they then drove it. This car was driven during the evening of April 25th of this year by both boys, Jerry Mempa and David Grant. It was then parked near a park. The following day, on April 26th, both boys, Jerry Mempa and David Grant, returned to the car and they drove the car that day until the transmission on this 1956 Chevrolet

finally gave out. Jerry Mempa states that he drove it for about two miles in reverse, and then parked it.

The people at South 308 Haven informed the police that they thought a neighbor boy might have had something to do with that, and that neighbor was David Grant. He was picked up by the police department, questioned, and he admitted everything that occurred pertaining to these cars. He was sent by the juvenile court to the Green Hill Academy at Chehalis, Washington.

At approximately 7:00 p.m. April 28th of this year Jerry Mempa, the defendant, was picked up; he was placed in the juvenile detention home. His officer, Mr. Jim Davis, was talking to him on April 29th of this year. As Mr. Davis was taking Jerry Mempa back to where he was being detained, the defendant broke away from the officer and ran out of the building and fled that particular area. The juvenile court remanded this particular case to the prosecutor's office on May 1st of this year, and then on May the 18th of this year, Jerry Mempa, accompanied by his stepfather, Mr. Dickerson, came in on their own to the Spokane County Sheriff's office and he turned himself in at that time. He has been in custody ever since.

THE COURT: Where at?

MR. ANDERSON: In the Spokane County jail, your Honor.

THE COURT: Mr. Roe?

MR. ROE: I think your Honor may have had some previous acquaintance with this case.

THE COURT: Quite a little.

MR. ROE: I was appointed to defend this man by Judge Kelly after he had been in jail some time, and statements had been taken from him and also the other participants, and it's clear beyond all reasonable doubt, as far as I'm concerned, that this crime was committed and this man is guilty. It's a sorry recital, obviously, of this boy's previous three or four years. The only one bright light, and one that I think should commend itself to the Court, is the fact that he gave himself up voluntarily on May 18th, after he successfully made an escape from the juvenile, and he has been in jail now for a month today.

He is a product of a broken home, he has been knocked about from early infancy, he hasn't even finished the eighth grade. At the time he first got into trouble—I believe this is correct, though Mr. Anderson can correct me if it's wrong—it was his participation in the burglary of a surplus store. The others were given probation and I believe one left the state, but only Jerry was sent to Chehalis, where he served eighteen months or so.

He has been pushed around even by the state, from one institution to another, from Chehalis to Western State to Eastern State; he has been knocked about by them. He hasn't been given a real break by the state yet. Even in this last deal, which is the subject of this charge today, your Honor, I believe from my limited information that of the three boys, David Grant, Charles Dickerson and Jerry Mempa, the only one before the Superior Court is Jerry Mempa. I believe that Charles Dickerson—who is no relation to the stepfather, I might add—was given proba-

tion. I believe that David Grant was sent back to Chehalis.

Now I know this poses a hard task and a difficult task for the court. I suppose an easy way would be to send him to Monroe. The fact that he is here in Superior Court indicates the gravity of the situation, but nevertheless this boy is not eighteen. He is just barely seventeen; he was sixteen when this occurred. If there is ever a chance to redeem him for society, or to make him indebted to society, it is now. This is the very last opportunity, it would appear to me. I don't know—I of course don't know the causes, and I doubt if anyone knows certainly the causes, why this boy is in trouble. His mother is here, very concerned, and his stepfather took time off from work to be here. He has another brother, age fourteen, who is a student at North Central High School and is making average grades, and so the home life must be acceptable enough. Not presuming at all upon the Court, but I have attempted to see what we could find for him in the way of work, if he got out of jail or if he was given some sentence in the county jail. It is difficult to find a job for a boy of this record and also his education. I have talked to a Richard Montoya, who runs the Dishman Body and Fender Shop and does tire recapping. He has indicated he would be interested in putting the boy to work. He can't promise a job right now, but he will later, and he can't pay much, but he could pay something, to give him something to do. He has never had a real job.

I have also talked to Mr. Paul Cooney, the attorney who previously represented Mr. Mempa.

Mr. Cooney is familiar with this, and of course he has tried to get a job for the boy, but it didn't pan out, but he has conferred with some of his clients in a light manufacturing enterprise, and they would be willing to take a chance on the boy. It depends on orders given, but there is a possibility around August 1st that there might be a job available there.

I think the Court should look at the case in this light, particularly since you have a previous acquaintance with this matter. The role of a judge in assessing the punishment in a trial, of course, has many factors. One is, of course, the satisfaction of the demands of the state. He has already served more time in dentention than many men who have committed much worse crimes than this. If he goes, I suppose that the chip on the shoulder that some of them come out with will be further aggravated. The only hope that I see is to make him realize that society is giving him a break, and that he is indebted to the Court or to society when they did not take advantage of him when they could, and that is by possibly giving him a chance now, so that he will have an understanding and a need to repay society, and possibly with that approach this boy can be saved. Certainly I think this is probably the last time. He has served a month in the county jail. An appropriate term in the county jail, if there was further work which was provided, I think could satisfy the demands of the state and at the same time preserve this young boy, still in his tender youth, for society. I ask that the Court look upon it in that light.

THE COURT: Is there anything you want to say, Mr. Anderson?

MR. ANDERSON: No, your Honor.

THE COURT: Well, gentlemen, the talk that you have made here, Mr. Roe, is almost similar to the one that the other counsel that you mentioned, Mr. Cooney, made. Every lawyer that has had any touch with this case has been convinced, honestly, as I think you are, that something went wrong with this boy somewhere, that he never recognized any of the responsibilities of citizenship. I have been impressed, the previous times that he has appeared before me when I was sitting in juvenile, that his father-in-law, or his stepfather was very kindly disposed to him. I think his parents both wanted this boy to get along, and were willing to do anything they could do, but apparently what they could do has been very short of what was required in his case. He has a genius for stealing cars. He will come up with a mechanism that he can cross-wire these cars, and he has a positive genius for that. Then he seems to have a genius for getting everybody that has tried to help him charged with the duty of taking care of him and getting entrapped with him. I don't know why —I haven't been in these places—but they don't want him at Green Hill, they don't want him at Medical Lake, and they don't want him at Western State. I don't know why, but it's true. I am inclined to agree with you, Mr. Roe, that this is a crossroads for this boy, this is a critical period in his life, but what I am disturbed by is that we, in juvenile, have given his parents and everybody else that could be reached a chance to do something with him, and everybody has failed,

and society keeps on suffering from his misdeeds. I venture to say that when he is out of the institution again, it won't take him ten days to get back in. They will pick him up somewhere—that's what concerns me. Have you any program or anything in mind? Have you tried to impress him with the necessity of abiding by the laws of society, Mr. Roe—that would help us in any way that would offer some hope to get him to realize his position?

MR. ROE: I have, your Honor, and I have told him that he can't beat society.

THE COURT: Have you convinced him?

MR. ROE: Well, he appears convinced to me, in jail, but I can't guarantee that my suggestion will stick. It is not pleasant in the county jail. I think—now is the first time he has been in a real jail, and possibly leaving him there for a few months—that's twice as hard as serving any place else. Maybe we can have some job available, maybe, during the summer, with Mr. Cooney or this tire recap under strict supervision, with a good dose of county jail time. Your Honor, I think it is the only hope. If he is ordered to the reformatory, I am afraid he is gone. Sixteen when this happened—or this happened before the age of sixteen—he is not too old to be turned.

THE COURT: Mr. Davis has a way with boys that is quite effective, and he did everything in the world that he could with this young man, and there just seems no influence of any kind that could reach him that I know of. After serving three years, from 1935 to 1938, in the position of Chairman of the Parole Board, I am

convinced of something that an old parole officer of many years of experience told me, that the hardest time, as far as pure punishment is concerned, that a prisoner serves is either in the county jail or a penitentiary in the first thirty days that he is there. After that time, he becomes case-hardened, he doesn't have the same reaction to his punishment and there's nothing gained except as far as society is concerned. But he bothers me very much. For that time he was in, he was falsifying with respect to how he got the new mechanism that he had, and he seems to be able to draw the boys to him, which is distressing, in these escapes. Now I realize there is a sort of code among these delinquents where they say they can steal five cars before anything serious will happen to them, but most of those boys, we can send them over to the training school and they come back and don't get into any more trouble, and this boy does have trouble. I have had letters from psychiatrists at our institutions; they have examined him; they can't convince themselves that he is insane; he is just apparently delinquent, and that's all.

You may stand up. Is there anything you want to say on your own behalf before the judgment of the Court is pronounced in this case?

MR. MEMPA: No sir.

THE COURT: Why is it, Jerry, that you won't listen to reason about your troubles?

MR. MEMPA: I listen.

THE COURT: We can't hear you.

MR. MEMPA: I said I listen.

THE COURT: Well, you never listened to your stepfather, did you?

MR. MEMPA: No.

THE COURT: He always treated you all right, didn't he?

MR. MEMPA: Yes.

THE COURT: Your mother provided a home for you, you had an opportunity to go to school, but you missed it every time, isn't that right?

MR. MEMPA: Yes sir.

THE COURT: And your mother has always been kind to you, hasn't she?

MR. MEMPA: Yes.

THE COURT: They don't want you to do this sort of thing. Now, you made some promises to Mr. Cooney, your other lawyer, didn't you? You told him you were going to stay out of trouble—didn't you say that to him?

MR. MEMPA: Yes.

THE COURT: What hope have I, what assurance have I to turn you loose on society once again?

MR. MEMPA: Well, I think I would make it this time.

THE COURT: You think you would make good?

MR. MEMPA: Yes.

THE COURT: How far did you get in school?

MR. MEMPA: I didn't get quite through the eighth grade.

THE COURT: What was the reason? Were you getting along all right in the eighth grade when you were pulled in the last time?

MR. MEMPA: Yes.

THE COURT: Why did you run from Mr. Davis over at the juvenile?

MR. MEMPA: Well, he said he was going to remand me to Superior Court, and told me the sentence would probably be ten years, I would probably go to Monroe.

THE COURT: What justification would I have now to let you go after you have served another thirty days in the county jail? Do you think you have learned something out of this?

MR. MEMPA: Yes.

THE COURT: Do you think you can resist from now on, if you served another thirty days down there, could you resist and steer another course now?

MR. MEMPA: Yes.

THE COURT: You don't say that very convincingly, young man.

MR. MEMPA: I could.

THE COURT: Anything else you want to say?

MR. MEMPA: No.

THE COURT: Very well. It is the further judgment of the Court that you be confined in the institution for a maximum period of ten years. Now, I am going to suspend every bit of that except thirty days. I want you to serve thirty days actually on this. I want to point out to you now that when you are released you are going to be under observation not of the juvenile officers, but of the state parole officers. Those men know their business. They are kindly disposed. They will be there for the purpose of seeing that you don't get back here again. Take advantage of this, or you are going to be back here. You are absolutely on your own now. Mr. Roe can't help you, and no one else can help you, and if you steal a car, you are going to Monroe and you are going to stay there.

I would think that you would realize that this is a real opportunity, and that you would behave yourself from now on.

MR. ANDERSON: Your Honor, actually what you are doing is placing the defendant on probation?

THE COURT: Yes, that is the effect of it. Except that he has served 15 days, I could make it for a period of two years. I should have done that. Mr. Roe, will you undertake to tell him once more for his own behalf that it is up to him from here on, now, that he become a good citizen.

MR. ROE: Yes sir, I will.

THE COURT: This is a probationary order, Mr. Roe, with the exception of his serving thirty days. I think it's regrettable that he has not finished his schooling, at least his eighth grade, and if there's any hope of getting him out here to the Industrial School, I would like to see him go. I have signed the order.

REPORTER'S CERTIFICATE

STATE OF WASHINGTON
COUNTY OF SPOKANE

I, Margaret Lehan, do hereby certify:

That I was the acting Court Reporter of the Superior Court of the State of Washington, in and for County of Spokane, on June 17, 1959;

That as such reporter I reported in shorthand pages Nos. 1 to 16, inclusive, in the above entitled cause; that the above and foregoing is a full, true and correct transcript of the stenographic notes taken by me of the proceedings had in the above matter on the above date, and that the same contains all objections made and exceptions taken therein.

/s/ MARGARET LEHAN

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Application for a Writ of Habeas Corpus of JERRY DOUGLAS MEMPA, *Petitioner*, v. B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Respondent*.	No. 39048

STATE OF WASHINGTON, }
COUNTY OF THURSTON, } ss.

I, WILLIAM M. LOWRY, Clerk of the Supreme Court of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct copy of the Order of Continuance, filed October 21, 1966; Transcript of Proceedings, *State vs. Mempa*, filed September 27, 1966, and the whole thereof, as they now appear of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 15th day of November, 1966.

[SEAL]

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington.